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IN THE

Supreme Court of the United States

OCTOBER, 1963 TERM.

No. 170

SAMUEL MOSLEY,

Petitioner,

against

CIA MAR ADRA, S.A. and LIPSETT STEEL PRODUCTS, INC.,

Respondents.

BRIEF OF RESPONDENT CIA MAR ADRA, S.A. IN OPPOSITION TO PETITION FOR CERTIORARI.

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The memorandum opinion of the United States District Court for the Southern District of New York is unreported. The opinion of the United States Court of Appeals for the Second Circuit is reported at 314 F. 2d 223.

Jurisdiction.

Though jurisdiction may exist under Title 28 U. S. C. Sections 1254(1) and 2101(c) the petition fails to establish that any genuine ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists in this case.

Although this court is asked to review an alleged error of the Court of Appeals in reversing a judgment entered on a jury verdict on the ground that it improperly invaded the function and province of the jury, no mention is made in the petition of the fact that the Court of Appeals also remanded the case for a new trial because of error on the part of the trial judge in charging the jury and thereby permitting them to make findings on grounds which were inadequate as a matter of law.

Thus, irrespective of the fact that Appellate Courts are not free to reweigh the evidence and set aside a jury verdict merely because different or more reasonable inferences or conclusions might be drawn from the evidence, the fact remains that where there is no evidence to support a finding the Court has not only the right but the duty to set aside the verdict.

Question Presented.

Though petitioner formulates the question as one involving an issue of whether the decision of the Court of Appeals improperly invaded the function and province of a jury under the Seventh Amendment of the Constitution, in reality such is not the question at all. Petitioner avoids any mention of the fact that the Court of Appeals reversed because on a review of the record it found that as a matter of law the evidence was insufficient to support one of the grounds on which the jury could have predicated its finding and since the verdict was general and there was no way to know whether the verdict was based on an invalid ground remanded the case for a new trial.

If any consideration is to be given to the complete decision of the Court of Appeals, the question actually presented for review is whether the Seventh Amendment fur-

ther circumscribes the power of the appellate tribunals so that such matters of law as sufficiency of evidence are no longer subject to review in jury cases.

Statement.

This litigation concerns a claim for damages for personal injuries which it is claimed were sustained by petitioner while he was employed as a longshoreman by respondent Lipsett Steel Products, Inc. and was engaged in loading scrap metal aboard a vessel owned by respondent Cia Mar Adra, S.A.

On the date in question, petitioner was the only longshoreman working in the hatch where the scrap metal was being stowed. He was there for the purpose, amongst others, of seeing to it that the scrap metal was properly stowed, that the ship was not damaged and that the loading progressed properly. Since the scrap metal was loaded into the hatch by means of loading chutes, petitioner's principal function was to stand out of the way of the loading chute and the area where the scrap metal was being shot and observe the loading operation. In performing this function he customarily stood in the wings of the hatch which were illuminated by the natural light.

Shortly before his alleged accident he observed some scrap metal which appeared to be the rear end of an automobile transmission lodged in the chute near the mouth of the chute. After assuring himself that no further scrap metal would be dropped into the chute by his fellow workers on the main deck, he picked up a piece of round iron, at each end of which the longshoreman had fashioned a hook, and walked toward the chute where the scrap metal had become lodged. On approaching this area, he stepped onto scrap metal which had fallen onto the deck in the course

of loading and proceeded to attach one end of the hook onto the lodged scrap. Petitioner then stationed himself erect and using both his strength and weight attempted to pull the scrap metal over the side of the chute rather than down the chute. According to petitioner, as he continued pulling on the hook, the metal on which he was standing rolled causing his feet to slip. As this occurred, the hook slipped off the scrap metal which was still caught in the chute and he fell backward.

On the trial, petitioner conceded that he was fully aware of the fact that he was standing on scrap metal and that he did not clear an area so that his feet could rest on the deck because it would have taken too long to do this. He contended, however, that because of the shadow cast on the area where he was standing by cargo loaded adjacent to this area on the previous day, he was unable to see where he was standing and that, therefore, the vessel was unseaworthy and its owner negligent and that such negligence and or unseaworthiness was the competent producing cause of his accident.

Though nowhere in the record was there any claim or proof that the hook which had been fashioned by the longshoreman from the scrap metal was in any way defective or that it caused or contributed to the occurrence of petitioner's accident or that the presence of the scrap metal on the deck constituted improper stowage, the trial judge, at petitioner's request, charged the jury that they could find the vessel unseaworthy not only because of the alleged absence of light but, also, if they found the hook inadequate or the place of work unsafe. As Judge Marshall pointed out in his opinion in charging the jury on unseaworthiness other than stating: "What about the hook with which the testimony deals", the trial judge made no mention of the hook at any other point in the charge, nor did he make any

effort to relate this statement to the governing principles of unseaworthiness.

Petitioner can point to no place in the entire record of this case where there is either proof or even an indication that the hook was either improper or caused or contributed to the accident. Certainly the fact that the hook was fashioned from a long piece of scrap steel, or that petitioner did not know where it came from or that it slipped off the scrap metal which was stuck in the chute is no evidence that it was improper or defective in any way.

Thus, when the Court of Appeals reversed the judgment and remanded the case for a new trial it was not invading the function and province of a jury, but passing only on a question of law. Since respondents had moved for a directed verdict at the close of petitioner's case and at the close of the entire case, the appellate court was required to review the evidence in order to determine whether there was any evidence on which to take the case to a jury. Its determination that there was an absence of such evidence to support at least one of the grounds on which the jury could have based its finding of unseaworthiness was a proper exercise of an appellate court function and its reversal, because there was no way to tell whether the general jury verdict may have been based on an invalid ground of unseaworthiness, was clearly required by this Court's holding in *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U. S. 613, 618.

THE ARGUMENT.

I.

The decision of the Court of Appeals reversing the judgment and remanding the case for a new trial related only to a question of law and was therefore correct.

The decision of the United States Court of Appeals for the Second Circuit is fully in accord with such decisions of this Court as *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500; *Gallick* v. *Baltimore & Ohio Railroad Co.*, 371 U. S. ....., 83 S. Ct. 659, 9 L. ed. 618; *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, 369 U. S. 355; *Harrison* v. *Missouri Pacific R.R. Co.*, ... U. S. ....., 83 S. Ct. 690, 9 L. ed. 2d 711; *Rasham* v. *Pennsylvania R. R. Co.*, ... U. S. ....., 83 S. Ct. 965, 10 L. ed. 2d 80, and others, on which petitioner attempts to rely. While it is true that in those cases this Court granted certiorari and on review reversed the appellate courts, it is also clear from the opinions that the scope of review by appellate courts is not so circumscribed that they are deprived of the power to review the evidence in order to determine as a matter of law whether there is any evidentiary basis for the jury's verdict.

Only recently this Court quoting from *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. ed. 916, 66 S. Ct. 740, in *Rasham* v. *Pennsylvania R. Co.*, 83 S. Ct. 965, 10 L. ed. 2d 80, reaffirmed this power of the appellate tribunals, when it said:

> "In reversing a state court judgment setting aside a jury verdict for the employee, this Court said, in language fully apposite here: 'Only when there is a complete absence of probative facts to support the

> conclusion reached (by the jury) does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U. S. at 653."

In each of the cases submitted by petitioner, the appellate court exceeded its function and though an evidentiary basis did exist for the conclusion reached by the jury it drew its own inference and substituted its own conclusion. In the subject action the Court of Appeals did neither. It found no evidentiary basis for one of the grounds on which the jury could have reached its conclusion and, since it could not ascertain from the jury's general verdict whether this was the basis for its verdict, reversed and remanded the case for a new trial, in accordance with the principle laid down by this Court in *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U. S. 613, 618.

The decision of the Court of Appeals, in reversing the judgment based on a general verdict and remanding it for a new trial because the case was submitted to the jury on an issue for which there was no evidentiary basis in the record, was therefore correct.

II.

The Seventh Amendment does not prohibit the Court of Appeals from reviewing the evidence to determine whether there is an evidentiary basis to support the verdict.

The Seventh Amendment does not preclude the appellate tribunals from reviewing the evidence in order to determine whether any probative facts existed to support the conclusion reached. This contention was rejected by this Court in *Galloway* v. *United States*, 319 U. S. 372, where it said at page 389:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. * * *"

The decision of the Court of Appeals reversing the judgment and remanding the case for a new trial is in no way violative of the Seventh Amendment and is not an invasion of the province or function of a jury.

III.

There is no valid basis for certiorari to review the non-final judgment.

Though this Court has for some exceptional reason granted certiorari to review a non-final judgment such as where the case is remanded for a new trial, no valid reason for such relief exists in this case. Certainly, petitioner's presentation of his application, as if it were concerned with

a final judgment, does not justify the intervention of this Court. It clearly does not involve any novel or important question of law or conflict of decisions. Nor does it concern an important and clear-cut issue of law, the determination of which is fundamental to the further conduct of the case.

Conclusion.

Petitioner's application for Writ of Certiorari should be denied.

Respectfully submitted,

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